CHAN HOCK LIONG

v.

ASSOCIATED MOTOR INDUSTRIES (M) SDN BHD

COURT OF APPEAL, PUTRAJAYA
ZULKEFLI MAKINUDIN JCA
LOW HOP BING JCA
ZAINUN ALI JCA
[CIVIL APPEAL NO: W-02-926-99]
29 AUGUST 2007

ADMINISTRATIVE LAW: *Judicial remedies - Judicial review - Dismissal - Reinstatement - Industrial Court ruling award of reinstatement not complied with - Whether erroneous - Whether employer doing everything possible to effectuate reinstatement - Whether amenable to judicial review - Industrial Relations Act 1967, ss. 20, 30(5), 33(1), 33B, 56*

LABOUR LAW: *Industrial Court - Award - Reinstatement - Non-compliance - Ruling that award of reinstatement not complied with - Whether Industrial Court rightly exercised its interpretative power in non-compliance proceedings - Industrial Relations Act 1967, ss. 20, 30(5), 33(1), 33B, 56*

This was an appeal against the decision of the High Court quashing by way of *certiorari* an award of the Industrial Court that ruled that the respondent employer, in failing to reinstate the appellant, was in breach of its order for reinstatement ('the Third Award'). The facts showed that having been so ordered by the tribunal, the respondent did intimate to the appellant to report for duty, but cautioned him to produce a written confirmation that he was not then in the employment of one Car Seats (M) Sdn Bhd. The appellant refused to report for duty or provide the confirmation, and on the contrary chose to treat his case as one of constructive dismissal. The High Court faulted the appellant for his predicament and ruled that the industrial tribunal was in error in granting the Third Award. The appellant hence appealed and argued that the High Court had erroneously interfered with the Third Award, it being a finding of fact by the industrial tribunal and therefore sheltered by s. 33B of the Industrial Court Act 1967 ('Act').

Held (dismissing appeal and affirming order of *certiorari*): Per Low Hop Bing JCA delivering the judgment of the court

(1) The determination of the issue of reinstatement revolves around a question of mixed law and fact and not on mere question of fact. (para 24)

(2) There can be no doubt that the respondent has complied with the Industrial Court's order for reinstatement. The respondent has made every effort to effect reinstatement and its request to the appellant to produce the written confirmation is consistent with para (iv) of the contract of service. (paras 29 & 36)

(3) The appellant had chosen not to be reinstated as he had continued his employment with Car Seats (M) Sdn Bhd. Consequently he was unable to produce the written confirmation. The practical effect of the appellant's choice is that he had wanted the best of both worlds, namely to be gainfully employed by Car Seats (M) Sdn Bhd and still to be treated as constructively dismissed, so as to obtain enormous compensation from the respondent. (paras 27 & 28)

(3a) The appellant's continued employment with Car Seats (M) Sdn Bhd, his refusal to give the written confirmation, his failure to report for duty and finally his decision to treat his unilateral conduct a case of constructive dismissal can hardly be construed as equitable or in accordance with good conscience. (para 35)

(4) The High Court was correct in issuing the order for *certiorari*. It is clear that the Industrial Court, in exercising its interpretative power under s. 33(1) in non-compliance proceedings brought before it under s. 56 of the Act, and in handing down the Third Award, ought to have acted according to equity, good conscience and substantial merits of the case. It has however failed to do so and in the process has occasioned an error of law which is amenable to judicial review by way of *certiorari*. (para 37)

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi kerana membatalkan melalui *certiorari* award Mahkamah Perusahaan yang memutuskan bahawa responden majikan telah melanggar perintah pengambilan semula apabila gagal mengambil semula perayu bekerja dengannya ('Award Ketiga'). Fakta menunjukkan bahawa, sewaktu diperintahkan sedemikian, responden ada memberitahu perayu supaya melapor diri untuk bertugas, tetapi memintanya memberi pengesahan bertulis bahawa beliau pada masa itu tidak lagi bekerja dengan syarikat Car Seats (M) Sdn Bhd. Perayu enggan kembali bertugas atau memberi pengesahan bertulis tersebut, dan sebaliknya menganggap kesnya sebagai satu kes pembuangan kerja konstruktif. Mahkamah Tinggi menyalahkan perayu atas masaalah yang dihadapinya sekaligus memutuskan bahawa tribunal perusahaan khilaf dalam mengeluarkan Award Ketiga. Akibatnya, perayu merayu dan berhujah bahawa Mahkamah Tinggi khilaf dalam mengganggu Award Ketiga, kerana award tersebut adalah suatu dapatan fakta oleh tribunal perusahaan dan kerana itu dilindungi oleh s. 33B Akta Mahkamah Perusahaan 1967 ('Akta').

Diputuskan (menolak rayuan dan mengesahkan perintah *certiorari*):
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah

(1) Penentuan isu pengambilan semula berkisar pada campuran persoalan undang-undang dan fakta dan tidak semata-mata pada persoalan fakta.

(2) Tidak ada keraguan bahawa responden telah mematuhi perintah pengambilan semula Mahkamah Perusahaan. Responden telah melakukan segala-galanya bagi memberi kesan kepada pengambilan semula dan permintaannya supaya perayu mengemukakan pengesahan bertulis adalah konsisten dengan perenggan (iv) kontrak perkhidmatan.

(3) Perayu memilih untuk tidak diambil semula kerana beliau ingin terus bekerja dengan Car Seats (M) Sdn Bhd. Akibatnya, beliau tidak dapat mengemukakan surat pengesahan bertulis. Kesan praktikal dari pilihan perayu ini adalah bahawa ia berhajat untuk mendapat yang terbaik dari kedua-dua dunia, iaitu terus bekerja dengan Car Seats (M) Sdn Bhd tetapi

dianggap telah dibuang kerja secara konstruktif, sekaligus membolehkannya mendapat gantirugi yang lumayan dari responden.

(3a) Tindakan perayu meneruskan pekerjaan dengan Car Seats (M) Sdn Bhd, enggan memberikan pengesahan bertulis dan tidak melapor diri, serta keputusannya untuk menganggap tindak tanduk sebelah pihaknya sebagai pembuangan kerja konstruktif, tidak boleh dianggap sebagai berekuiti atau selaras dengan akal budi.

(4) Mahkamah Tinggi betul dalam mengeluarkan perintah *certiorari*. Jelas bahawa Mahkamah Perusahaan, dalam melaksanakan kuasa pentafsirannya di bawah s. 33(1) di dalam prosiding ketidak-patuhan yang dibawa di hadapannya di bawah s. 56 Akta, dan dalam memberikan Award Ketiga, harus bertindak menurut ekuiti, akal budi dan merit substantial kes. Ia bagaimanapun gagal berbuat demikian dan dalam proses tersebut telah melakukan kekhilafan undang-undang yang terbuka kepada semakan kehakiman melalui *certiorari.*

Case(s) referred to:

Dragon & Phoenix Bhd v. Kesatuan Pekerja-pekerja Perusahaan Membuat Tekstil dan Pakaian & Anor [1991] 1 CLJ 244; [1991] 1 CLJ (Rep) 109 SC ***(refd)***

Holiday Inn Kuala Lumpur v. National Union of Hotel, Bar and Restaurant Workers [1988] 1 CLJ 133; [1988] 1 CLJ (Rep) 116 SC ***(refd)***

Hodge v. Ultra Electric, Ltd [1943] 1 KB 462 ***(refd)***

Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd & Anor [2004] 1 CLJ 8 CA ***(refd)***

William Jacks & Co (M) Sdn Bhd v. S Balasingam [2000] 7 MLJ 1 CA ***(refd)***

Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***

Tanjong Jara Beach Hotel Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia [2004] 4 CLJ 657 FC ***(refd)***

Thilagavathy Alagan Muthiah v. Meng Sing Glass Sdn Bhd & Anor [1997] 4 CLJ Supp 368 HC ***(refd)***

V Subramaniam & Ors v. Craigielea Estate [1982] 1 MLJ 317 FC ***(refd)***

William Dixon, Ltd v. Patterson [1943] SC (J) 78 ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20, 30(5), 33(1), 33B, 56

For the appellant - B Lobo; M/s Lobo & Assoc
For the respondent - N Sivabalah; M/s Shearn Delamore & Co

[Appeal from High Court, Kuala Lumpur; Originating Motions No: r2-25-98-98]

Reported by WA Sharif

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] On 3 November 1999, the learned judge of the Kuala Lumpur High Court allowed the notice of motion of the respondent – employer ("the employer") and issued an order of certiorari which quashed Industrial Court Award No. 379 of 1998 dated 27 July 1998 ("the Third Award"). The appellant – employee ("the employee") has lodged this appeal against the High Court decision.

Factual Background

[2] The employee was dismissed by the employer on 8 August 1988. Pursuant to representations made under s. 20 of the Industrial Relations Act 1967, the employee's dismissal was referred to the Industrial Court. The Industrial Court *vide* Award No. 322 of 1993 ("the First Award") held that the dismissal was without just cause or excuse and ordered the employee's reinstatement, in addition to back wages of 24 months ("the back wages").

[3] For brevity and convenience, a reference to a section hereinafter is a reference to that section in the Industrial Relations Act 1967 unless otherwise stated.

[4] The employer *vide* letter dated 3 November 1993 reinstated the employee to his former position and required the employee to report for duty on 16 November 1993.

[5] The employer's letter also requested the employee to give his written confirmation that he was no longer in the employment of his then employer, Car Seats (M) Sdn. Bhd. ("the written

confirmation"), failing which the employer would be at liberty to treat the reinstatement as void. This request is consistent with the express term contained in para (iv) of the employee's contract of service with the employer ie, upon the continuance of the employee's employment with the employer, the employee was not to engage directly or indirectly in any other business or occupation ("para (iv) of the contract of service").

[6] The employee *vide* letter dated 17 November 1993 informed the employer that he would not be reporting for duty at all.

[7] In response thereto, the employer *vide* letter dated 19 November 1993 expressed regrets that the employee had decided not to report for duty.

[8] The employee continued to remain in the employment of Car Seats (M) Sdn. Bhd.

[9] The employee subsequently lodged two applications in the Industrial Court against the employer *viz*:

(a) under s. 56, for non-compliance with the orders for reinstatement and back wages in the First Award handed down by the Industrial Court ("application (a)"); and

(b) under s. 33, seeking a variation of the First Award ("application (b)").

[10] The Industrial Court handed down an award ("the Second Award") dismissing application (b). The Second Award was subsequently affirmed by the High Court as well as the Court of Appeal.

[11] In relation to application (a), the Industrial Court handed down the Third Award and held that the employer had failed to comply with the order for reinstatement. The Industrial Court also ordered the employer to reinstate the employee on 17 August 1998. The employer then reinstated the employee and requested the employee to produce the written confirmation. The employee again refused to do so and had never reported to the employer for duty at all. Instead, he had treated himself as constructively dismissed. Meanwhile, he remained as an employee of Car Seats (M) Sdn. Bhd.

[12] The employer subsequently commenced proceedings for an order of *certiorari* in the High Court to quash the Third Award. The High Court allowed the employer's application for *certiorari* and quashed the Third Award. Against the High Court decision, the employee filed the instant appeal to this court.

[13] As the employer has paid the back wages to the employee, this appeal is confined to the issue of reinstatement only.

Reinstatement

[14] Employee's learned counsel Mr. B. Lobo submitted that the Industrial Court had handed down the third award pertaining to reinstatement as a finding of fact which is sheltered by s. 33B, and so the learned judge of the High Court had erroneously interfered with the Third Award by quashing it. Support was sought in:

(1) *William Jacks & Co. (M) Sdn. Bhd v. S. Balasingam* [2000] 7 MLJ 1 CA;

(2) *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9 CA;

(3) *Ngeow Voon Yean v. Sungei Wang Plaza Sdn. Bhd & Anor* [2004] 1 CLJ 8 CA; and

(4) *Tanjong Jara Beach Hotel Sdn. Bhd v. National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia* [2004] 4 CLJ 657 FC.

[15] Learned counsel Mr. N. Sivabalah contended for the employer that the High Court had correctly held that the employer had complied with the order for reinstatement. He relied *inter alia* on:

(1) *Holiday Inn Kuala Lumpur v. National Union of Hotel, Bar and Restaurant Workers* [1988] 1 CLJ 133; [1988] 1 CLJ (Rep) 116 SC; and

(2) *Dragon & Phoenix Bhd v. Kesatuan Pekerja-pekerja Perusahaan Membuat Tekstil dan Pakaian & Anor* [1991] 1 CLJ 244; [1991] 1 CLJ (Rep) 109 SC.

[16] Having regard to the above factual background, I am of the view that in this appeal, the question for determination may be formulated as follows:

A Did the High Court judge err in holding that the employer had complied with the order for reinstatement and in setting aside the Third Award of the Industrial Court?

[17] Since the Third Award was handed down pursuant to application (a) under s. 56, this section, where relevant, merits B reproduction as follows:

56. Non-compliance with award ...

(1) Any complaint that any term of any award ... which has C been taken cognizance of by the Court has not been complied with may be lodged with the Court in writing by any ... person bound by such award.

(2) The Court may, upon receipt of the complaint:

D (a) make an order directing any party:

(i) to comply with any term of the award ...; or

(ii) to cease or desist from doing any act in contravention of any term of the award ... .

E **[18]** As will be seen later in this judgment, the question of interpreting an award under s. 33 is also relevant and significant. Hence, s. 33, where applicable, merits reproduction as follows:

33. Interpretation ... of awards ...

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(1) If any question arises as to the interpretation of any award ... taken cognizance of by the Court, any party bound by the award ... may apply to the Court for a decision on the question.

G (2) The Court may, upon the application of any party, by order vary any of the terms of an award ... if it considers it desirable so to do for the purpose solely of removing ambiguity or uncertainty.

[19] Sections 56 and 33(1) were judicially considered by the H Federal Court in *Tanjong Jara Beach Hotel, supra*, in which the question ventilated for determination by the Federal Court was whether the Industrial Court had the jurisdiction to exercise its interpretative power under s. 33(1) in non-compliance proceedings brought under s. 56 ("the question").

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[20] Steve Shim CJ (SS), delivering the judgment of the Federal Court, answered the question in the affirmative. His Lordship held that there may be cases in which interpretation of an award is a *sine qua non* to ascertain whether there has been non-compliance with the same (see p. 669 c-d). In giving the answer, the Federal Court also considered the issue of whether the Industrial Court's interpretation disclosed an error of law.

[21] In the instant appeal, I shall apply the above principle and approach set out by the Federal Court. For this purpose, it is necessary for me to put in place the meaning of the word "reinstatement".

[22] "Reinstatement" involves putting the specified person, in law and in fact, in the same position as he occupied in the undertaking before the employer terminated his employment: per Tucker J in *Hodge v. Ultra Electric, Ltd* [1943] 1 KB 462 at p. 466.

[23] To "reinstate" as applied to a man who has been dismissed (*ex hypothesi* without justification) is to replace him in the position from which he was dismissed and so to restore the *status quo* ante the dismissal: per the Lord Justice-Clerk (Lord Cooper) in *William Dixon, Ltd v. Patterson* [1943] SC (J) 78 at p. 85.

[24] It is abundantly clear to me that the determination of the issue of reinstatement revolves around a question of mixed law and fact. It is not merely a question of an exclusive finding of fact.

[25] As a general rule, where an award of the Industrial Court revolves around an exclusive finding of fact based on credibility of witnesses, the High Court in the exercise of its judicial review jurisdiction is not inclined to interfere with such finding: see eg, s. 33B, *William Jacks & Co, supra, Quah Swee Khoon, supra, and Ngeow Voon Yean, supra.*

[26] However, where there is a question of mixed law and fact, as in the issue of reinstatement before the High Court and now in the instant appeal, our superior courts cannot simply fold their arms nor adopt a non-interference approach.

[27] Reverting to the mainstream of the factual background, it needs to be observed that the employee had chosen not to be reinstated as he had continued his employment with Car Seats (M) Sdn. Bhd. Consequently he was unable to produce the written confirmation.

[28] The practical effect of the employee's choice is that he had wanted the best of both worlds ie, to be gainfully employed by Car Seats (M) Sdn Bhd and still to be treated as constructively dismissed, so as to obtain enormous compensation against the employer.

[29] In the employer's reinstatement exercise, the employer's request to the employee to produce the written confirmation is consistent with para (iv) of the contract of service. There can be no dispute that the employer has indeed complied with the Industrial Court's order for reinstatement. The Third Award clearly runs counter to fundamental jurisprudence in industrial law which espouses the doctrine of equity, good conscience and substantial merits of the case.

[30] This fundamental jurisprudence in industrial law has been given statutory expression in s. 30(5), pursuant to which the Industrial Court shall act according to equity, good conscience and substantial merits of the case without regard to technicalities and legal form.

[31] In *Tanjong Jara Beach Hotel, supra,* at p. 672 b-d, the learned Chief Judge Sabah and Sarawak said:

> In applying the powers under s. 30(5) above, the Industrial Court has to bear in mind the underlying objective and purposes of the Act itself ie, that it is a piece of legislation designed to ensure social justice to both employers and employees and to advance the progress of industry by bringing about harmony and cordial relationship between the parties; to eradicate unfair labour practices; to protect workmen against victimization by employers and to ensure termination of industrial disputes in a peaceful manner. Clearly therefore, the *raison d'etre* of the Industrial Court is to endeavour to resolve the competing claims of employers and employees by finding a solution which is just and fair to both parties with the object of establishing harmony between capital and labour and fostering good relationship.

[32] Of singular significance is the principle that the Act is designed to ensure social justice to both employers and employees. In my view, social justice is not to be administered as a monopoly of the employee to the exclusion of the employer. Social justice is to be meted out in favour of the employee just as much as it is to be done for the employer.

[33] The employer's request for the written confirmation is not out of the ordinary. It is indeed part and parcel of and is in complete consonance with para (iv) of the contract of service.

[34] There is no dispute whatsoever that the employer has made every effort to comply with the order for reinstatement. The employer's request for the written confirmation is obviously not an obstacle to the creation of harmony and cordial relationship between the employer and the employee. It does not constitute unfair labour practice. It cannot be construed as victimization of the employee by the employer. Being in consonance with para (iv) of the contract of service, there can be no doubt that it is a fair and just solution in the process of complying with the order for reinstatement.

[35] The employee's continued employment with Car Seats (M) Sdn. Bhd, his refusal to give the written confirmation, his failure to report to the employer for duty and finally his decision to treat his unilateral conduct as constructive dismissal by the employer, can hardly be construed as equitable or in accordance with good conscience.

[36] On the other hand, the steps taken by the employer are consistent with substantial merits of the case. As the employer has made every effort to effect reinstatement of the employee, it is incumbent on the employee to honour his contractual obligations contained in para (iv) of the contract of service. However, the employee was oblivious to his contractual obligations.

[37] In the exercise of its interpretative power under s. 33(1) in non-compliance proceedings brought under s. 56 in application (a), and in handing down the Third Award, the Industrial Court ought to have acted according to equity, good conscience and substantial merits of the case, as it is mandatory under s. 30(5). In my view, in handing down the Third Award, the Industrial Court has failed to do so. It has therefore occasioned an error of law which is amenable to judicial review by way of *certiorari.* Hence, the learned judge of the High Court was correct in issuing the order for *certiorari*: see eg, *Holiday Inn Kuala Lumpur, supra,* and *Dragon & Phoenix Bhd, supra.*

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Severability And Severance

[38] It was argued for the employee that:

(1) the orders for reinstatement and payment of back wages in the Third Award were not severable and that the severance thereof by the High Court has resulted in the Third Award being unworkable; and

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(2) as the employer had already paid the back wages, the order for reinstatement should have been affirmed by the High Court.

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[39] The employer's response is that the High Court had quashed the Third Award relating to reinstatement only and the issue of back wages is separate and distinct. Support was sought in:

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(1) *Thilagavathy a/p Alagan Muthiah v. Meng Sing Glass Sdn. Bhd & Anor* [1997] 4 CLJ Supp 368 HC; and

(2) *V. Subramaniam & Ors v. Craigielea Estate* [1982] 1 MLJ 317 FC.

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[40] I am unable to agree with the submission presented for the employee. Back wages had never been an issue at all in the instant appeal as the employee had already received full payment therefor. There is no question of severability and severance of the Third Award, as the only issue in the instant appeal pertains exclusively to reinstatement.

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[41] Be that as it may, for the sake of completeness, even assuming for a moment that there was severance by the High Court of the Third Award, such severance is indeed supported by authorities.

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[42] In *Thilagavathy a/p Alagan Muthiah, supra,* Abdul Kadir Sulaiman J (later FCJ) held *inter alia* that the issue of back wages was a separate matter altogether from the award of compensation *in lieu* of reinstatement.

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[43] Further, in *V. Subramaniam & Ors, supra,* the Industrial Court, in ordering the reinstatement of the four employees, did not order that they be reinstated in their former position as trainees or on probation, but as having been confirmed in their

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appointments. The Federal Court speaking through Suffian LP (as he then was) held that as the award of the Industrial Court was a mistake, it was severable, so that the High Court could quash that part which was a mistake without touching the rest.

[44] In my view, there was no error on the part of the High Court in quashing the Third Award.

Conclusion

[45] On the foregoing grounds, I hold that the learned High Court judge had correctly concluded that the employer had complied with the order for reinstatement. The employee's appeal is dismissed with costs. The High Court's order of *certiorari* is hereby affirmed. Deposit to the employer on account of taxed costs.

[46] My learned brother Zulkefli Ahmad Makinudin, JCA and my learned sister Zainun binti Ali, JCA have read this judgment in draft and have expressed their agreement with it.